85-1724

Supreme Court, U.S.
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APR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1985

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POLLY MCANNALLY UNDERWOOD,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

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PETITION FOR A WRIT OF
CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF ALABAMA

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BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Were the Petitioner's due process rights violated when the trial court allowed illegal testimony into evidence concerning the ultimate issue of fact for the jury, viz., in an arson case a deputy fire marshal was allowed to testify that the fire was "deliberately" set?

PARTIES

In the Circuit Court of Blount County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein and Polly McAnnally Underwood, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Blount County, Alabama, and have been at issue throughout these proceedings.

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247 Ala. 55, 22 So.2d 548 (1945)

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Morland v. State,
373 So.2d 1259 (Ala.Cr.App. 1979)

TABLE OF CONSTITUTIONAL PROVISIONS

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Fifth Amendment

Fourteenth Amendment

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction is not as yet reported but will be reported as follows:

Underwood v. State, _____ So. 2d _____ (Cr.App.Ala. 1985)

A copy of the same is submitted in Appendix "A" to this petition.

The order of the Alabama Supreme Court denying the Petitioner's writ of certiorari is not as yet reported as follows:

Ex Parte: Polly McAnnally Underwood
In re: Underwood v. State,
_____So.2d _____(S.Ct.Ala, 1986)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on February 21, 1986, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in Petitioner's writ include the Fifth Amendment to the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States. A copy of these amendments are submitted as Appendix "C" to this petition.

STATEMENT OF THE CASE AND FACTS

I

The Petitioner was tried by a jury for second degree arson and a verdict of guilty was returned. She was sentenced to eight years in the State penitentiary and ordered to pay $35,000.00 restitution. As appeal followed to the Court of Criminal Appeals.

The basis of the Petitioner's appeal was as follows: her due process rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated when the trial Court allowed the deputy fire marshal to testify that the fire had been "deliberately" set.

On October 8, 1985, the Court of Criminal Appeals of Alabama affirmed the conviction of the Circuit Court, the

opinion of which is submitted as Appendix "A" . An application for rehearing was filed in the Court of Criminal Appeals raising the same issues was denied without opinion on November 12, 1985.

Mrs. Underwood then petitioned the Supreme Court of Alabama for a writ of certiorari alleging the same issues. The petition was denied without opinion on February 21, 1986.

II

The petition is based on the following facts:

Petitioner rated a building in which she ran a beauty shop and cosmetology school. In January, 1982, the building "exploded" and partially burned. This occurred one night after the shop had closed for the day. Petitioner denied setting the

building on fire. A deputy fire marshall was allowed to testify, over objection, that the fire was deliberately set and that kerosene had been used as an accelerant.

ARGUMENT

Petitioner asserts to this Honorable Court that she was denied her due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, when the trial judge allowed testimony that invaded the province of the jury and was the ultimate issue of fact for the jury to decide.

The petitioner was charged with arson and during the trial the deputy fire marshal was allowed to testify, over defense objections, that the fire had been "deliberately" set and kerosene was used as an accelerant. It is a direct violation of all due process rights for such testimont to be admitted in an arson case.

The Alabama Court of Criminal Appeals did not deny that it was error for the testimony to be admitted, instead, they

held that the objection interposed was not properly worded. However, the trial court, by the objection, was made aware of the erroneous question asked by the prosecutor, and was asked to rule.

Alabama has a long line of cases that specifically speak to the issue at hand but were apparently overlooked by our State courts.

In Hughes v. State, 412 So.2d 296 (Ala.Cr.App. 1982), the Alabama Court of Appeals held that it was improper to elicit testimony in an arson case as to whether the fire was "intentional" or "of incendiary origin" since it formed a conclusion that was for the jury to determine. It went on to say that

> " Even an expert may not give an opinion on the issue since the cause of a fire in the ultimate fact in an arson case."

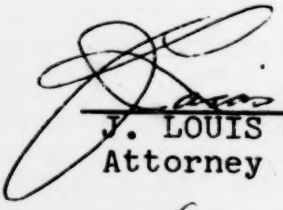
See also Morland v. State, 373 So.2d 1259 (Ala.Cr.App. 1979) and Colvin v. State, 247 Ala. 55, 22 So.2d 548 (1945).

It was certainly prejudicial error for the trial court to allow testimony of this nature since it was the very issue the jury was to decide. That is, whether the fire was deliberately set by someone. If that question is decided negatively by the jury then obviously there is no case of arson. But, when a trial court allows the question to be determined by an expert witness, then the court has taken the case away from the jury and actually let the witness decide the key issue. To do such is to deny a defendant a fair trial by due process of law.

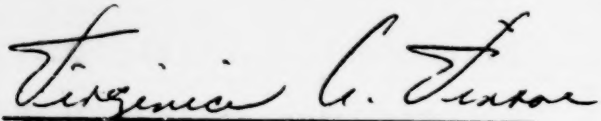
CONCLUSION

It is undisputed that the testimony of the deputy fire marshal is manifestly prejudicial, and as this Court has held on many occasions, the controlling principle is to ensure that all of our citizens are guaranteed the rights afforded them under our Constitution. As a citizen and a defendant in a criminal case, the Petitioner is guaranteed a fair and impartial trial by due process of law. The underlying and controlling principle in all criminal cases is that the accused be afforded due process of law. Such was not done in the instant case and the Petitioner was denied her rights under the Fifth and Fourteenth Amendments to the United States Constitution. A reversal of this case is mandated.

Respectfully submitted,



J. LOUIS WILKINSON
Attorney for Petitioner

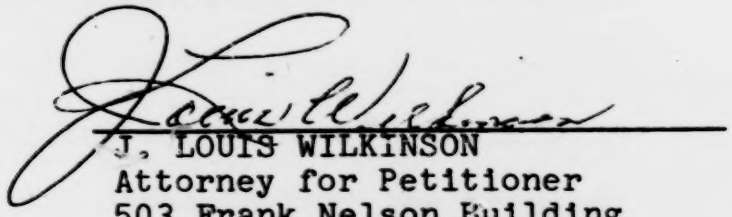


VIRGINIA A. VINSON
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed to the attorneys for the Respondent, certified mail, this the 21 day of April, 1984, and addressed as follows:

Honorable Charles Graddick
Attorney General
205 Administrative Building
Montgomery, Alabama 36130



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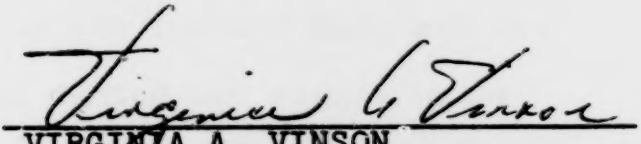

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